S.B. Civil Misc. Appeal No.1483/2005

Smt. Krishna Devi.
vs.
Ram Chandra.

Date : 2.8.2006

HON'BLE MR. PRAKASH TATIA, J.

Mr. MC Bhoot, for the appellant.
Mr. Durga Ram for Mr.Sajjan Singh, for the respondent.

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At the request of the learned counsel for the parties, this appeal is heard finally and decided.

The present appeal is directed against the order 12.7.2005 by which the first appellate court after setting aside the judgment and decree of the trial court dated 28.2.2003 remanded the entire suit to the trial court. The reason for remand given by the first appellate court is that the trial court did not determine the rent in pursuance of the order of the High Court.

The reason given for setting aside of the judgment and decree perse is absolutely illegal. Assuming for the sake of the arguments that the trial court should have determined the rent before deciding the suit, even for that purpose, the finding recorded by the trial court on merit of all the issues could not have been set aside by the

appellate court. In this case, the appellate court has not even set aside the findings on any of the issues decided by the trial court, still without any reason set aside the entire judgment and decree of the trial court.

It appears that the first appellate court failed to appreciate the legal position. The first appellate court can remand the case to the trial court under Order 41 Rule 23 CPC in a contingency when the trial court has decided the suit on a preliminary point and the decree is reversed by the appellate court and the appellate court thereafter directs the trial court to try the issues arising in the case. Present case is not falling under Order 41 Rule 23 CPC. In a case where the suit is decided by the trial court not on a preliminary point and the appeal is preferred and the appellate court reversed the judgment and decree of the trial court and a retrial is considered necessary by the appellate court, then the case can be remanded under Order 41 Rule 23A CPC to the trial court. In this case, the first appellate court has not given any reason for retrial of the case. In the facts of the case, there was no reason for retrial of the entire case. The first appellate court could not have ordered the retrial of the entire case only on the ground of non-determination of rent by the trial court or wrong determination of rent. If the finding of the trial court on the question of benefit of first default was dependent upon the determination of rent/redetermination of rent or where tenant has not been given opportunity to cross examine plaintiff and his witnesses or was not

allowed to lead evidence due to striking off the defence of the defendant and that order is set aide and retrial on issues is necessary, then the appellate court can remit the case under Order 41 Rule 25 CPC without setting aside the finding recorded by the trial court on other issues and without setting aside the judgment and decree. Only for determination or redetermination of rent or because of necessity of obtaining finding on the issue of default from the trial court, the findings recorded by the trial court on the other issues cannot be set aside and the decree cannot be reversed.

It is pertinent to mention here that the first appellate court has not specifically reversed the findings of the trial court recorded on any other issue. The order though has been passed of reversal of the decree of the trial court and retrial has been ordered under Order 41 Rule 23A CPC, the order is non-speaking so far as setting aside of the finding of the trial court on the other issues decided by the trial court.

The first appellate court also should have looked into Rule 24 of Order 41 CPC which provides that where the evidence upon the record is sufficient to enable the appellate court to pronounce the judgment, the first appellate court can after resettling the issues, if necessary, finally determine the suit notwithstanding that the judgment of the court from whose decree the appeal is preferred, has proceeded wholly upon some ground other than

that on which the appellate court proceeds.

Order 41 Rule 25 CPC provides procedure for referring the issues to the trial court for determination. In this case, the first appellate court has not framed the issue nor directed the trial court to hold the trial for any issue afresh nor has directed the trial court to redetermine the question of fact.

In view of the above, this appeal is partly allowed, the order of the first appellate court dated 12.7.2005 is set aside so far as setting aside of judgment and decree of the trial court is concerned.

The appeal shall remain pending before the first appellate court and the trial court shall determine the rent within a period of fifteen days from the date of receipt of copy of this order.

Since learned counsel for the appellant submitted that in the instant case, parties led evidence on all issues including on issue regarding default, therefore, there is no need for taking evidence by the trial court on any of issue. The trial court after determination of rent shall forthwith sent the file to the first appellate court. The tenant shall be entitled to deposit the rent as may be determined by the trial court in the trial court even when the file will be before the first appellate court.

Both the parties are directed to remain present in Court before the trial court on 28.8.2006.

The first appellate court, after receipt of file from

the trial court with the order of determination of rent shall decide the appeal within a period of six months thereafter.

(PRAKASH TATIA), J.

S.Phophaliya